

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

NANCY LORRAINE WILLS,

10-CV-166-BR

Plaintiff,

OPINION AND ORDER

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,

Defendant.

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**BROWN, Judge.**

Plaintiff Nancy Lorraine Wills seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which he denied Plaintiff's application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act. This Court has jurisdiction to review the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

For the reasons that follow, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

**ADMINISTRATIVE HISTORY**

Plaintiff filed her applications for SSI and DIB on

July 24, 2006, and alleged a disability onset date of November 7, 1999. Tr. 108-10.<sup>1</sup> The applications were denied initially and on reconsideration. An Administrative Law Judge (ALJ) held a hearing on July 16, 2009. Tr. 20-61. Plaintiff was represented by an attorney at the hearing. Plaintiff and a VE testified. At the hearing, Plaintiff amended her disability onset date to October 1, 2001. Tr. 23.

The ALJ issued a decision on July 16, 2009, in which she found Plaintiff was disabled as of September 1, 2005, and, therefore, Plaintiff is only eligible for SSI benefits. Tr. 10-19. Pursuant to 20 C.F.R. § 404.984(d), that decision became the final decision of the Commissioner on January 25, 2010, when the Appeals Council denied Plaintiff's request for review.

#### **BACKGROUND**

Plaintiff was born on October 11, 1946, and was 62 years old at the time of the hearing. Tr. 108. Plaintiff obtained a college degree. Tr. 25. She has past relevant work experience as a bank teller. Tr. 17.

Plaintiff alleges disability due to chronic atrial fibrillation, degenerative disc disease of the lumbar spine, degenerative joint disease of the right knee, obesity, asthma,

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<sup>1</sup> Citations to the official transcript of record filed by the Commissioner on July 14, 2010, are referred to as "Tr."

arthritis of the hands, intestinal problems, and suicidal ideation. Tr. 12-13.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 15-16.

### **STANDARDS**

The initial burden of proof rests on the claimant to establish disability. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9<sup>th</sup> Cir. 2005). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner bears the burden of developing the record. *Reed v. Massanari*, 270 F.3d 838, 841 (9<sup>th</sup> Cir. 2001).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). "Substantial evidence means more than a mere scintilla, but less than a

preponderance, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9<sup>th</sup> Cir. 2006)(internal quotations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Robbins*, 466 F.3d at 882. The Commissioner's decision must be upheld even if the evidence is susceptible to more than one rational interpretation. *Webb v. Barnhart*, 433 F.3d 683, 689 (9<sup>th</sup> Cir. 2005). The court may not substitute its judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9<sup>th</sup> Cir. 2006).

### **DISABILITY ANALYSIS**

#### **I. The Regulatory Sequential Evaluation**

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Parra v. Astrue*, 481 F.3d 742, 746 (9<sup>th</sup> Cir. 2007). See also 20 C.F.R. § 404.1520. Each step is potentially dispositive.

In Step One, the claimant is not disabled if the

Commissioner determines the claimant is engaged in substantial gainful activity. *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9<sup>th</sup> Cir. 2006). See also 20 C.F.R. § 404.1520(a)(4).

In Step Two, the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.1520(a)(4)(ii).

In Step Three, the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.1520(a)(4)(iii). The criteria for the listed impairments, known as Listings, are enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, he must assess the claimant's Residual Functional Capacity (RFC). The claimant's RFC is an assessment of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 404.1520(e). See also Soc. Sec. Ruling (SSR) 96-8p. A "'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p, at \*1. In other words, the Social Security Act does not require complete

incapacity to be disabled. *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9<sup>th</sup> Cir. 1996). The assessment of a claimant's RFC is at the heart of Steps Four and Five of the sequential analysis engaged in by the ALJ when determining whether a claimant can still work despite severe medical impairments. An improper evaluation of the claimant's ability to perform specific work-related functions "could make the difference between a finding of 'disabled' and 'not disabled.'" SSR 96-8p, at \*4.

In Step Four, the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.1520(a)(4)(iv).

If the Commissioner reaches Step Five, he must determine whether the claimant is able to do any other work that exists in the national economy. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 404.1520(a)(4)(v). Here the burden shifts to the Commissioner to show a significant number of jobs exist in the national economy that the claimant can do. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 404.1520(g)(1).

**ALJ'S FINDINGS**

At Step One, the ALJ found Plaintiff had not engaged in substantial gainful activity from her alleged onset date of October 1, 2001, through her December 31, 2002, date last insured and later. Tr. 12.

At Step Two, the ALJ found Plaintiff has the severe impairments of chronic atrial fibrillation, degenerative disc disease of the lumbar spine, degenerative joint disease of the right knee, and obesity. Tr. 12. The ALJ found Plaintiff's asthma, arthritis of the hands, intestinal problems, and suicidal ideation not to be severe. Tr. 13.

At Step Three, the ALJ concluded Plaintiff's medically determinable impairments do not meet or medically equal one of the listed impairments in 20 C.F.R. part 404, subpart P, appendix 1. Tr. 24. The ALJ also found before September 1, 2005, Plaintiff had the RFC to perform "the full range of sedentary work." Tr. 14.

At Step Four, the ALJ concluded Plaintiff is not capable of performing her past relevant work. Tr. 17.

At Step Five, the ALJ found before September 1, 2005, Plaintiff could perform jobs that existed in significant numbers in the national economy, but after that date Plaintiff could not do so. Tr. 17-18. Because September 1, 2005, is after Plaintiff's date last insured, the ALJ found Plaintiff is not



entitled to DIB. Nevertheless, the ALJ concluded Plaintiff was disabled after September 1, 2005, and, therefore, is entitled to SSI benefits.

### **DISCUSSION**

Plaintiff challenges only the ALJ's conclusion that Plaintiff was not disabled between her alleged onset date of October 1, 2001, and her date last insured of December 31, 2002, and, therefore, that she is not eligible for DIB. Plaintiff contends the ALJ erred when she (1) improperly rejected Plaintiff's testimony, (2) improperly rejected lay-witness testimony, and (3) improperly assessed Plaintiff's RFC.

#### **I. The ALJ did not err when she rejected Plaintiff's testimony.**

Plaintiff alleges the ALJ erred when she failed to provide clear and convincing reasons for rejecting Plaintiff's testimony.

In *Cotton v. Bowen* the Ninth Circuit established two requirements for a claimant to present credible symptom testimony: The claimant must produce objective medical evidence of an impairment or impairments, and he must show the impairment or combination of impairments could reasonably be expected to produce some degree of symptom. *Cotton*, 799 F.2d 1403, 1407 (9<sup>th</sup> Cir. 1986). The claimant, however, need not produce objective medical evidence of the actual symptoms or their severity. *Smolen*, 80 F.3d at 1284.

If the claimant satisfies the above test and there is not any affirmative evidence of malingering, the ALJ can reject the claimant's pain testimony only if she provides clear and convincing reasons for doing so. *Parra v. Astrue*, 481 F.3d 742, 750 (9<sup>th</sup> Cir. 2007)(citing *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995)). General assertions that the claimant's testimony is not credible are insufficient. *Id.* The ALJ must identify "what testimony is not credible and what evidence undermines the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834).

The ALJ found Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms," but Plaintiff's "statements concerning the intensity, persistence and limiting effects of these symptoms are less than credible prior to September 1, 2005." Tr. 15. The ALJ noted Plaintiff's reported activities before September 1, 2005, "suggest her cardiovascular and respiratory symptoms were not as disabling as alleged at the hearing." Tr. 16. For example, beginning in December 2002 Plaintiff reported to June Hawkins, M.D., treating physician, that she was able to go to the gym daily and to do aerobic and strength-building exercises. Tr. 16, 259, 266, 273. The ALJ also noted Plaintiff reported to Dr. Hawkins in November 2003 that she had "been busy with refinish work, painting, [and] sanding of woodwork in the house." Tr. 16, 261.

The Court concludes on this record that the ALJ did not err when she rejected Plaintiff's testimony as to the intensity, persistence and limiting effects of her symptoms prior to September 1, 2005, because the ALJ provided legally sufficient reasons supported by the record for doing so.

**II. The ALJ erred when she implicitly rejected Thelma Butzlaff's July 30, 2009, statement.**

Plaintiff contends the ALJ erred when she implicitly rejected the July 30, 2009, lay-witness statement of Thelma Butzlaff.

Lay testimony regarding a claimant's symptoms is competent evidence that the ALJ must consider unless he "expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9<sup>th</sup> Cir. 2001). See also *Merrill ex rel. Merrill v. Apfel*, 224 F.3d 1083, 1085 (9<sup>th</sup> Cir. 2000)("[A]n ALJ, in determining a claimant's disability, must give full consideration to the testimony of friends and family members.>").

Butzlaff submitted two written statements: one on August 9, 2006, and one on July 30, 2009. Butzlaff's August 9, 2006, statement did not specifically limit Butzlaff's observations to the period between October 1, 2001, and December 31, 2002. In Butzlaff's July 30, 2009, statement, however, Butzlaff noted she was "only commenting on what [she] knew about [Plaintiff] for the period from the end of 2001 to the end of 2002." Tr. 211.

The ALJ gave "great weight" to Butzlaff's statements in reaching her conclusion that Plaintiff was disabled after September 1, 2005. Tr. 16. The ALJ, however, did not address the fact that Butzlaff in her July 30, 2009, statement noted Plaintiff suffered virtually the same level of impairment from the end of 2001 to the end of 2002. Because the ALJ concluded Plaintiff was not disabled before her date last insured of December 31, 2002, it appears the ALJ implicitly rejected Butzlaff's July 30, 2009, statement as to Plaintiff's impairments during the relevant period, and the ALJ did not provide any reasons for doing so.

The Court concludes on this record that the ALJ erred when she implicitly rejected Butzlaff's July 30, 2009, statement because the ALJ did not provide legally sufficient reasons supported by the record for doing so.

### **III. The ALJ erred in her assessment of Plaintiff's RFC.**

Plaintiff contends the ALJ failed in her assessment of Plaintiff's RFC because the ALJ (1) did not include the limitations noted in Plaintiff's testimony; (2) did not include the limitations noted in Butzlaff's July 30, 2009, statement; and (3) concluded Plaintiff did not suffer an impairment before her December 31, 2002, date last insured that lasted or could be expected to last for a continuous period of not less than 12 months.

**A. Plaintiff's testimony**

The Court already has concluded the ALJ did not err when she rejected Plaintiff's testimony in part. The Court, therefore, also concludes the ALJ did not err when she failed to include in her assessment of Plaintiff's RFC the impairments alleged in Plaintiff's testimony.

**B. Lay-witness statement**

The Court already has concluded the ALJ erred when she implicitly rejected Butzlaff's July 30, 2009, statement. The Court, therefore, also concludes the ALJ erred when she failed to include in her assessment of Plaintiff's RFC the limitations Butzlaff alleged Plaintiff suffered from prior to September 1, 2005.

**C. Plaintiff's RFC during the period between October 1, 2001, and December 31, 2002.**

Plaintiff contends the ALJ erred when she found Plaintiff had the RFC to perform a full range of sedentary work between her October 1, 2001, alleged onset date and her December 31, 2002, date last insured on the ground that Plaintiff did not have an impairment in that period that lasted or could be expected to last for a continuous period of not less than 12 months.

The ALJ found:

With regard to her cardiovascular condition, the evidence of record documents her ablation surgery

in November 2001, which ultimately proved unsuccessful in resolving her symptoms. A pacemaker was installed in October 2002. The record documents cardiovascular symptoms between June 2002 and May 2003, . . . which would reasonably impact [Plaintiff's] ability to sustain employment. These symptoms did not persist at such a level, however, for a period of 12 months or more. Following another ablation procedure in March 2003, [Plaintiff] reported that she still experience mild fluttering but that her symptoms were much, much improved from where she as before.

Tr. 15 (citations and quotations omitted). Plaintiff asserts the record reflects Plaintiff suffered severe cardiovascular symptoms in the 14-month period between October 1, 2001, and December 31, 2002, that reasonably impacted her ability to sustain employment. Plaintiff points to a number of instances in the record in which Plaintiff reported symptoms of fibrillation and angina. Tr. 550-51, 554. As the ALJ noted, Plaintiff underwent ablation surgery in November 2001 in an effort to control her symptoms, but that surgery was unsuccessful.

The ALJ also noted, however, that Plaintiff reported going to the gym regularly and doing aerobics and strength training beginning in July 2002. In fact, Donald P. Stutzman, M.D., treating cardiologist, reported Plaintiff's atrial fibrillation did not become a consistent problem until September 2005 when Plaintiff was in atrial fibrillation "most of the time." Tr. 15, 294.

The Court concludes on this record that the ALJ did not err when she found Plaintiff did not have an impairment that lasted

or could have been expected to last for a continuous period of not less than 12 months between October 1, 2001, and December 31, 2002, because the ALJ provided legally sufficient reasons supported by the record for doing so.

### REMAND

Generally the decision whether to remand for further proceedings or for immediate payment of benefits is within the discretion of the Court. *Harman v. Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 1038 (2000). *See also Smolen*, 80 F.3d at 1292. The Ninth Circuit, however, has established a limited exception to this general rule. *Id.* Under the limited exception, the Court must grant an immediate award of benefits when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

*Id.* The second and third prongs of the test often merge into a single question: Whether the ALJ would have to award benefits if the case were remanded for further proceedings. *See id.* at 1178 n.2.

The ALJ gave great weight to Butzlaff's August 2006 statement in determining Plaintiff was disabled after

September 1, 2005. The Court, however, has concluded the ALJ erred when she implicitly, without providing reasons, rejected Butzlaff's July 30, 2009, statement, which related to Plaintiff's impairments before her date last insured and in which Butzlaff noted limitations substantially similar to Plaintiff's limitations after September 1, 2005.

The Ninth Circuit has held an ALJ is required to consider testimony from a lay witness, *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9<sup>th</sup> Cir. 2009), and failure to do so requires remand unless the Court "can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Stout*, 454 F.3d at 1056. On this record, the Court cannot conclude "no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." Accordingly, the Court must remand this matter.

In addition, the Court finds the administrative record is not sufficiently clear to determine that Plaintiff is entitled to immediate DIB. In the exercise of its discretion, therefore, the Court concludes the limited exception requiring the Court to grant an immediate award of DIB does not apply, and this matter should be remanded for further proceedings.



Accordingly, the Court remands this matter for further administrative proceedings consistent with this Opinion and Order.

**CONCLUSION**

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

IT IS SO ORDERED.

DATED this 26th day of April, 2011.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge